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No. 308

In the Supreme Court of the United States

OCTOBER TERM, 1944

WILLIAM CAMMICK WAGONER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The majority (R. 44-47) and dissenting (R. 47-49) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 2, 1944 (R. 49), and a petition for rehearing was denied July 5, 1944 (R. 50). The petition for a writ of certiorari was filed July 31, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the indictment, based on Section 11 of the Selective Training and Service Act and charging petitioner with the offense of evading registration as required by the Act, is sufficient to support petitioner's conviction.

STATUTE INVOLVED

The Selective Training and Service Act of 1940, 54 Stat. 885, as amended (50 U. S. C. App. 301 et seq.) provides in pertinent part as follows:

SECTION 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

* * * * *

SECTION 11. * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any

other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, * * * or of said rules, regulations, or directions, * * * or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, * * *.

* * * * *

SECTION 14. (a) Every person shall be deemed to have notice of the requirements of this Act upon publication by the President of a proclamation or other public notice fixing a time for any registration under section 2.¹

¹ Section 2 (a) of the President's Proclamation of January 5, 1942 (7 F. R. 177), provides in part as follows:

"Every male citizen of the United States, and every other male person residing in the continental United States * * * other than persons excepted by Section 5 (a) of the Selective Training and Service Act of 1940, as amended, and by Section 208 of the Coast Guard Auxiliary and Reserve Act of 1941, is required to and shall on February 16, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board having jurisdiction in the area in which he has his permanent

STATEMENT

On February 27, 1942, petitioner was indicted in the United States District Court for the Northern District of Indiana for violation of Section 11 of the Selective Training and Service Act of 1940, as amended. The indictment charged that petitioner "on or about the 16th day of February, 1942, did then and there unlawfully, knowingly, wilfully and feloniously evade registration as required by the Selective Training and Service Act of 1940, as amended, by then and there unlawfully, knowingly, wilfully and feloniously failing and refusing to present himself for and submit to registration at such time and place and in such manner as determined by the rules and regulations prescribed under said Act, as amended"² (R. 1-2).

Prior to his trial petitioner advised the court that he was able to employ counsel (R. 3) but that he did not desire representation by an attorney and that he did not want the court to

home or in which he may happen to be on that day if such male citizen or other male person on December 31, 1941, has attained the twentieth anniversary of the day of his birth and on February 16, 1942, has not attained the forty-fifth anniversary of the day of his birth, and has not heretofore been registered under the Selective Training and Service Act of 1940 and the regulations thereunder: * * *

² On April 13, 1942, petitioner pleaded guilty to the charge of the indictment (R. 2), but on January 3, 1944, after several continuances of the case (R. 2), the district court permitted him to withdraw his plea of guilty and to enter a plea of not guilty (R. 3).

appoint counsel for him since "for Scriptural reasons" he desired to defend himself (R. 6). Petitioner did not challenge the sufficiency of the indictment. When the case was called for trial, the court found that petitioner knowingly and intelligently waived his right to be represented by counsel and the case thereafter proceeded to trial before a jury with petitioner representing himself (R. 6).

The Government's proof showed that on the day for registration, February 16, 1942,³ petitioner was forty years of age, having been born in Marion, Indiana, on September 19, 1901 (R. 8, 9, 14), and he resided in Grant County, Indiana, within the jurisdiction of Local Board No. 2, Grant County, Indiana (R. 7). Petitioner knew that he was required to register on February 16, 1942, as required by the Act and the President's Proclamation, but instead of doing so, he mailed a letter to his local board on that date in which he stated, *inter alia*, that "as a Christian under the leadership of the Holy Spirit I can not register; and so I am informing you of my situation in advance" (R. 8). Petitioner did not register at any time thereafter, although he was accorded a further opportunity to do so on February 21, 1942 (R. 10, 14). The jury found petitioner guilty and he was sentenced to imprison-

³ See the President's Proclamation of January 5, 1942 (footnote 1, *supra*, p. 3).

ment for one year and one day (R. 29). On appeal the judgment was affirmed, one judge dissenting (R. 44-49).

ARGUMENT

Petitioner contends (Pet. 9-11) that the failure of the indictment specifically to allege that he was a male citizen or resident between the ages of 20 and 45 was an omission of an essential element of the offense and for that reason the indictment was open to attack for the first time in the court below.⁴ This contention, we submit, is without substance.

Section 11 of the Selective Training and Service Act of 1940 makes it an offense, *inter alia*, for any person to evade registration under the Act (*supra*, p. 3). In accordance with the terms of the statute the indictment (*supra*, p. 4) charged that petitioner (1) knowingly (2) evaded registration (3) as required by the Act, in that he did not register in the manner provided by the rules and regulations issued under the Act. The indictment, in the language of the statute, plainly meets the applicable test, i. e., whether it sets forth the essential elements of the offense with sufficient definiteness and certainty to apprise the

⁴ Petitioner asserts that the indictment should have alleged that he was a male citizen or male person residing in the United States between the ages of 18 and 65; under the President's Proclamation of January 5, 1942 (footnote 1, *supra*, p. 3), the duty of registration on February 16, 1942, extended to such persons between 20 and 45 years of age.

defendant of the crime charged and to protect him against further prosecution for the same offense. Cf. *United States v. Lepowitch*, 318 U. S. 702, 704; *Hagner v. United States*, 285 U. S. 427, 431-433; *Lamar v. United States*, 241 U. S. 103, 116; *Hopper v. United States*, 142 F. (2d) 181, 184 (C. C. A. 9); *United States v. Wernecke*, 138 F. (2d) 561 (C. C. A. 7), certiorari denied, 321 U. S. 771; *Bersio v. United States*, 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States v. Goldsmith*, 108 F. (2d) 917, 920-921 (C. C. A. 2), certiorari denied, 309 U. S. 678.⁵ Petitioner's contention that an element of the offense was not charged overlooks the fact that the indictment specifically alleged that he evaded the registration required of him by the Act. Implicit in this allegation is a charge that petitioner was a member of the class of persons required to register under the Act, as implemented

⁵The obligation to register under the Selective Training and Service Act is so well understood and the requirements have been so widely publicized, that a charge of failing to register cannot be said to be subject to any reasonable probability of misinterpretation or uncertainty. Under no fair interpretation might it be claimed that petitioner, charged with evasion of registration in the language of the statute, was placed at any disadvantage in preparing or making any defense that he might have had. And the record demonstrates that petitioner was fully aware of his obligation to register on February 16, 1942, for on that day, instead of appearing for registration, he wrote to his local board that he could not register "as a Christian under the leadership of the Holy Spirit" (R. 10).

by authorized regulations, that is, a male person between the ages of 20 and 45. While these facts might appropriately have been made more explicit in the indictment, we submit that the failure to do so did not amount to a failure to allege an element of the offense proscribed by Section 11. As a practical matter, if petitioner desired greater specificity in respect of this element of the offense he might properly have secured the information by a motion for a bill of particulars. *Glasser v. United States*, 315 U. S. 60, 66; *United States v. Polakoff*, 112 F. (2d) 888, 890 (C. C. A. 2), certiorari denied, 311 U. S. 653.⁶ Having failed to make such a motion or to object to the indictment at any stage of the trial, petitioner is not now in a position to urge that his conviction should be overturned because of the failure of the indictment to describe the offense in greater detail. *Hagner v. United States*, 285 U. S. 427, 433; *Holmgren v. United States*, 217 U. S. 509, 523; *Durland v. United States*, 161 U. S. 306, 315; *Moore v. United States*, 56 F. (2d) 794 (C. C. A. 10); *Sykes v. United States*, 264 Fed. 945 (C. C. A. 9), certiorari denied, 254 U. S. 655.⁷ Since the indictment

⁶ Since petitioner intelligently and competently waived representation by counsel, the fact, suggested by the dissenting judge below (R. 49), that petitioner may not have known of the motion for a bill of particulars does not avail him now.

⁷ *Ruthenberg v. United States*, 245 U. S. 480, upon which petitioner relies (Pet. 10), is not authority for the proposition that the indictment was required to allege that peti-

alleged all of the elements of the offense and petitioner has made no showing that he suffered any prejudice from the lack of specificity of which he complains, 18 U. S. C. 556,⁸ as the court below stated (R. 46), requires that the judgment of conviction shall remain undisturbed.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully

tioner was a male person between the designated ages. In that case one of the plaintiffs in error challenged his conviction for failure to register under the Selective Draft Law of 1917 on the ground that the indictment was insufficient because it failed to allege that he was a citizen of the United States or a person not an alien enemy who had declared his intention to become a citizen. This Court rejected the contention, pointing out that although these persons were the only ones subject to military duty under the Act, "all male persons between the ages of twenty-one and thirty, both inclusive (with certain exceptions not here material), were required to register" (245 U. S. at 483). It held that it was sufficient to charge that plaintiff in error was a male person between the designated ages (*ibid.*). However, the question whether the indictment would have been fatally defective if it had failed to allege the age and sex of the plaintiff in error was not before the Court.

⁸ That statute provides in pertinent part:

"No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *."

submit that the petition for a writ of certiorari should be denied.

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AUGUST 1944.

